IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 61037-6-I
Respondent,	)	DIVISION ONE
v.	)	
STEVEN MARK BUCKMINSTER,	)	UNPUBLISHED
Appellant.	)	FILED: July 27, 2009

Cox, J. — The evidence before the trial court raised serious concerns about whether the six-year-old victim had sufficient memory to retain an independent recollection of the alleged sex abuse. But even if the trial court erred in determining that the victim was competent to testify, the remaining evidence of guilt was strong, rendering any error harmless. Accordingly, we affirm Steven Buckminster's conviction for one count of first degree child rape.

The State charged Buckminster with one count of first degree child rape following an incident on July 16, 2005. At trial, which began in October 2007, Rose Powell testified that in July 2005, she was living with her three children, including four-year-old A.R., in an Auburn apartment. Powell's brother, sister-in-law, niece, and father also lived in the apartment,

Powell had worked together with Buckminster in early 2005 and eventually allowed him to live in the apartment, where he slept on the couch. After several months, Powell asked Buckminster to leave because he was unable to pay the rent and because he continued to provide her children candy

and snacks against her wishes. Powell was also concerned that Buckminster might pose a danger to her children's safety and told him he was not allowed to be alone with them. After he moved out, Buckminster returned occasionally and spent time with Powell and her children.

On the evening of July 15, 2005, Buckminster took Powell to a casino. When they returned to the apartment around midnight, Powell went to bed, believing that Buckminster would leave after he chatted with her father. A.R. slept in Powell's bedroom.

When Powell awoke the following morning, she noticed that A.R. was no longer in the bedroom. Powell walked out of the bedroom and heard A.R.'s favorite video playing on the television. When Powell turned from the hallway into the living room, she saw A.R. with her head near the floor and feet up on the sofa. A.R.'s shorts were around her ankles. According to Powell, Buckminster was kneeling on the floor and "[h]is head and his tongue was located in between my daughter's legs."[1]

Powell asked Buckminster, who did not immediately notice her presence, what he was doing. Buckminster looked down at A.R. and immediately jumped up, asking A.R., "what are you doing?"[2] After Powell told Buckminster to "get the F out," he grabbed his shoes and left. Powell called A.R. over and felt that her vagina and underwear were wet. Powell called 911, and the police arrested Buckminster at a nearby convenience store.

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[1] Report of Proceedings (November 15, 2007) at 738.
[2] Id. at 739.

After the police arrived, Powell went with A.R. to the hospital. Dr. Vicki Sakata, the emergency room physician, examined A.R. and found some redness in her vaginal area, but could not attribute the irritation to a specific cause. During an interview, A.R. told Dr. Sakata that "Steve was licking me."[3] When asked where he was licking her, A.R. pointed between her legs.

On July 20, 2005, Ashley Wilske, a child interview specialist, talked with A.R. The interview was recorded and played for the jury. Because the audio quality was relatively poor, the jurors were given a transcript to follow while viewing the recording. A.R. told Wilske that she knew a person named Steve and that he had licked her one time. She indicated that the licking occurred under her "tummy" and that Steve had pulled down her pants and touched her with his hand. A.R. also described how her head was near the floor and her feet were on the couch.

At the pre-trial competency hearing in October 2007, A.R. was unable to remember Buckminster or the charged events. After considering A.R.'s testimony, the recorded interview, and Wilske's testimony, the trial court concluded that A.R. was competent to testify. At trial, A.R. was also unable to remember Buckminster or the alleged abuse.

The state crime lab tested the inside crotch area of A.R.'s underwear and found amylase, a chemical compound normally found in human saliva, and what appeared to be a mixture of male DNA profiles. Two samples were sent to ReliaGene Technologies, a private lab, for further DNA testing using the Y-STR

[3] Id. at 843.

method, which isolates male DNA. ReliaGene's testing established the presence of at least two male profiles in the samples. The DNA in the "major DNA profile," which was present in a much higher quantity than the DNA in the minor profile, matched Buckminster's profile and excluded at least 99.8 percent of the population.

Buckminster gave two statements that were admitted at trial. He told the arresting officer that A.R. had been naked with her feet on the couch, but claimed he was not paying attention to her.

In a second interview, Buckminster denied that he removed A.R.'s pants or touched her improperly. He explained that while he was watching television, A.R. had been jumping around and standing on her head, trying to get his attention. At one point, Buckminster nibbled on her toes. Later, Buckminster looked over and noticed for the first time that A.R.'s pants were down and she appeared to be exposed. At this point, Powell walked in:

> [A]nd so then I looked up, and her mom, [Powell] was standing there and I looked up there and then I looked down and A.R. had – her pants were down or something like this. And I was there and I looked at it, whoop, help, you know. I didn't know what to say, and then [Powell] says something like, I thought so.
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> And I like, I didn't know what to say and she said, I want you to leave right now, and so, you know, I just walked out the door and started driving, you know, and uhm, boy, you know, that didn't look good.[4]

Buckminster said that A.R. "kinda teases a little bit."

[4] Report of Proceedings (November 26, 2007) at 1365.

The jury found Buckminster guilty as charged, and the court imposed a standard-range minimum term of 100 months.

COMPETENCY

Buckminster contends that the trial court erred in ruling that A.R. was competent to testify. He argues that because she demonstrated no independent memory of the alleged abuse at the time of the competency hearing, A.R. was incompetent to testify as a matter of law.

> A child is competent to testify at trial if she has
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> (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.[5]

"The competency of a youthful witness is not easily reflected in a written record, and we must rely on the trial judge who sees the witness, notices the witness's manner, and considers his or her capacity and intelligence."[6] Consequently, we review the trial court's determination of competency for an abuse of discretion.[7]

Buckminster challenges the third Allen factor, which requires the trial court to determine whether the witness has a memory sufficient to retain an independent recollection of the occurrence. The witness need not testify about

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[5] State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967); see also RCW 5.60.050(2).

[6] State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005).

[7] Woods, 154 Wn.2d at 617; State v. S.J.W., 149 Wn. App. 912, 922, 206 P.3d 355 (2009).

the specific occurrence at the competency hearing. An ability to relate contemporaneous events may support an inference that the witness is competent to testify about the charged incidents as well.[8]

At the time of the competency hearing in October 2007, A.R. was six and in first grade. After reviewing the video of A.R.'s interview, which occurred on July 20, 2005, four days after the charged incident, the trial court noted that A.R. generally satisfied the Allen requirements at the time of the incident. But at the competency hearing, A.R. no longer appeared to have a current memory of the charged incident and did not recognize Buckminster. Although A.R. could recall certain past events, she could not provide any details about events occurring before she attended kindergarten. The court concluded that even though A.R. did not appear to recall the abuse, she was competent to testify in a general sense for purposes of the right of confrontation.[9]

Although the trial court based its decision on the evidence at the competency hearing, "on appeal we will examine the entire record to review that determination."[10] At trial, after viewing a portion of the videotaped interview with Wilske, A.R. testified that she remembered talking to the interview specialist about "Steve." But A.R. clearly could still not recall Steve or any details of what had happened. Although A.R.'s trial testimony suggested a minimal memory of contemporary events, the evidence was arguably insufficient to support an

[8] State v. Przbylski, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987).

[9] See State v. Price, 158 Wn.2d 630, 650, 146 P.3d 1183 (2006) (victim's loss of memory of alleged abuse did not violate defendant's right of confrontation).

[10] S.J.W., 149 Wn. App. at 925 (quoting State v. Avila, 78 Wn. App. 731, 737, 899 P.2d 11 (1995)).

inference that A.R. was competent to testify about the abuse.[11]

But even if the trial court abused its discretion in finding that A.R. was competent to testify, any error was harmless. An evidentiary error is harmless if, within reasonable probabilities, the outcome of the trial would not have been materially affected absent the error.[12] The parties agree that if A.R. had not testified, the recording of A.R.'s interview with Wilske would have been excluded as testimonial under Crawford v. Washington.[13]

The State's remaining evidence of guilt was strong. Powell testified that she observed Buckminster abusing A.R. and then found that A.R.'s vagina and underwear were wet. Buckminster's statements to police corroborated most of Powell's account. Shortly after the incident, A.R. told Dr. Sakata that "Steve was licking me." Finally, the State presented evidence excluding 99.8% of the population that Buckminster's DNA was on the inside crotch area of A.R.'s underwear.

Buckminster points to the fact that he impeached Powell with several prior theft convictions, but he fails to identify any motive that Powell might have had to fabricate such serious allegations. Even after Buckminster moved out of Powell's apartment, he continued to visit her and the children. Dr. Donald Riley, the defense's DNA expert, expressed concern that ReliaGene's test results "may represent false results due to contamination." But Dr. Riley acknowledged that

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[11] See Przybylski, 48 Wn. App. at 665.

[12] State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

[13] 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (declarant's testimonial hearsay statements inadmissible unless declarant unavailable and defendant had a prior opportunity for cross-examination).

he could not say with any degree of scientific certainty that ReliaGene's testing procedures in this case caused any contamination.

Given the strength and nature of the State's remaining evidence, we find no reasonable likelihood that the evidentiary error affected the outcome of the trial.

Buckminster has filed three separate documents as a statement of additional grounds for review.[14] He alleges that the State violated his right to consult with counsel, mischaracterized certain evidence in its brief, and mixed up evidence from an unrelated case involving A.R. He also contends that he was denied effective assistance when defense counsel failed to subpoena or investigate his proposed witnesses or to seek retesting of the DNA evidence.

But Buckminster either fails to indicate how the alleged errors resulted in prejudice or bases his claims of error on events and evidence that are not part of the record on appeal. This court cannot consider matters outside the record in a direct appeal.[15] Accordingly, we do not address Buckminster's contentions.

We affirm the judgment and sentence.

/s/ Cox, J.

[14] RAP 10.10.

[15] See State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (reviewing court will not consider matters outside of the trial record on direct appeal).

WE CONCUR:

/s/ Lau, J.

/s/ Schindler, C. J.